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No. 94-438

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

JOHN C. ELLINGSWORTH, Warden, Sussex Correctional Institution, and CHARLES M. OBERLY, III, Attorney General of the State of Delaware,

Petitioners,

v.

GEORGE L. REYNOLDS,

Respondent.

On Petition for Writ of Certiorari

To The United States Court of Appeals

For The Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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November 22, 1994

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59 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 3

CONCLUSION 17

APPENDIX

Excerpts from Hearing on George L. Reynolds' Motion for Postconviction Relief (Del. Super., November 12, 1982 and February 28, 1983) App. R-1

Scheduling Order by Judge Roderick R. McKelvie of the United States District Court for the District of Delaware (August 4, 1994) App. R-14

Order Staying Briefing and Argument by Judge Roderick R. McKelvie of the United States District Court for the District of Delaware (August 29, 1994) App. R-16

TABLE OF AUTHORITIES

CASES

Brown v. Allen, 344 U.S. 443 (1953) 5

Brownstein v. Director of Illinois Dep't of Corrections, 760 F.2d 836 (7th Cir. 1985), *cert. denied*, 474 U.S. 858 (1985) 8

Coleman v. Thompson, 111 S.Ct. 2546 (1991) 6, 13

Conyers v. State, Del. Supr., 422 A.2d 345 (1980) 11

Drope v. Missouri, 420 U.S. 162 (1975) 3

Engle v. Isaac, 456 U.S. 10 (1982) 12

Fay v. Noia, 372 U.S. 391 (1963) *passim*

Heflin v. United States, 358 U.S. 415 (1959) 15

Henry v. Mississippi, 179 U.S. 433 (1965) 7

Keeney v. Tamayo-Reyes, 112 S.Ct. 1715 (1992) 6

Lefkowitz v. Newsome, 420 U.S. 283 (1975) 8

Miller v. Fenton, 106 S.Ct. 445 (1985) 13

Reynolds v. Ellingsworth, 843 F.2d 713 (3rd Cir. 1988) (*Reynolds I*), *cert. denied*, 488 U.S. 960 (1988) 4, 12, 14

United States ex rel. Bolognese v. Brierly, 412 F.2d 193 (3rd Cir. 1969) 7

Vasquez v. Hillery, 106 S.Ct. 617 (1986) 15

Wainwright v. Sykes, 433 U.S. 72 (1977) *passim*

STATUTES

28 U.S.C. § 2254 4, 13, 14

Rule 35, Delaware Superior Court Rules of Criminal Procedure 9, 11

TABLE OF AUTHORITIES - Continued

OTHER AUTHORITIES

Robert Goss Szabo, *Federal Habeas Corpus and the Doctrine of Waiver Through the Deliberate Bypass of State Procedures*, 21 LA. L. REV. 601 (1971) 5

STATEMENT OF THE CASE

The Statement of the Case as set forth in the Petition for Writ of Certiorari is not entirely conclusive. The following is offered only to supplement, not supplant, it. As such, Respondent sets forth only those facts misstated or overlooked by Petitioners.

1. The Trial

An extensive investigation of the crime scene at the Snyder general store yielded fingerprints and hair samples, none of which could be linked to any particular suspect, including Mr. Reynolds. Trial Testimony (Tr.) 60-61, 67-69. The State's case against Mr. Reynolds was entirely circumstantial and no physical evidence was presented at trial linking Mr. Reynolds to the Snyder homicide. Furthermore, upon immediately securing the crime scene, not one witness in the area questioned by police identified Mr. Reynolds as either the perpetrator or present at the scene. Tr. 59-60.

At the hearing during the trial to determine the admissibility and voluntariness of Mr. Reynolds' two March 1976 statements, Detective Perry admitted that Mr. Reynolds was induced to make the statements with a reward of $2,000 for information leading to the arrest and conviction of Snyder's murderers. The detective also testified Mr. Reynolds was induced by the suggestion that if he helped with the Snyder investigation, the prosecutor would negotiate with Mr. Reynolds regarding his release from the other unrelated charges for which he was being held. Tr. 151-153.

The only evidence supporting Mr. Reynolds' conviction came from one Miles Cuffee, himself a former suspect, whose testimony and statements to police consisted of at least seven

different versions of how he acquired knowledge of the Snyder homicide.[1] Tr. 262-336, 379-387, 396-441. Cuffee's testimony was further discredited by the testimony of Toby Lee Terry. Terry testified that Cuffee told him the information Cuffee gave to the police about Mr. Reynolds' involvement in the Snyder homicide was false. Tr. 475-479.

Furthermore, the final jury instructions at Mr. Reynolds' trial did not include the standard admonition that opening and closing statements are not to be considered as evidence.

5. Federal Habeas Corpus Proceedings - Part 3

The Court of Appeals for the Third Circuit reversed and remanded the case to the district court for consideration of the merits of Mr. Reynolds' habeas petition. App. 28.[2] On August 4, 1994, the district court issued a scheduling order requesting both parties to file briefs addressing the merits of Mr. Reynolds' habeas petition; oral argument was scheduled to be held on October 25, 1994. App. R-14 and R-15. This was the first indication Mr. Reynolds ever received that the district court intended to review his case on the merits without the imposition of a procedural bar. However, it became necessary to stay the briefing and argument schedule until the instant petition for writ of certiorari was decided, App. R-16, constituting yet another delay in the review of Mr. Reynolds' habeas petition on its merits.

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[1] The substance of similar testimony by Cuffee at the trial of co-defendant Tommy Young was discussed by the court in State v. Young, No. 77-09-0001-0004, letter op. at 6 (Del. Super., October 4, 1982), where Cuffee's brother, Julian Cuffee, filed an affidavit that Cuffee lied at trial. The affidavit and testimony in support thereof resulted in the court granting a new trial for Young based on the lack of credibility of Cuffee's testimony.

[2] All references to the Petitioners' Appendix will be cited as "App. __." All references to the Respondent's Appendix will be cited as "App. R-__."

REASONS FOR DENYING THE WRIT

I. The Decision of the Court of Appeals Does Not Depart From The Principles of Federal Habeas Jurisprudence.

The right to a fair trial is a fundamental liberty guaranteed by the Fourteenth Amendment to the United States Constitution. *Drope v. Missouri*, 420 U.S. 162, 172 (1975). Mr. Reynolds' federal habeas corpus petition asserts that his fourteenth amendment right to a fair trial and due process of law was violated (1) by misconduct arising from the prosecutor's extensive references in his opening statement to alleged confessions by Mr. Reynolds that were never entered into evidence and (2) from abuse of discretion by the trial judge in failing *sua sponte* to instruct the jury to disregard the improper references by the prosecutor.

Mr. Reynolds' due process claims have never been reviewed on their merits because of judicial invocation of improper procedural bars. Mr. Reynolds has twice appealed his habeas petition's denial of review to the Court of Appeals for the Third Circuit, which court has both times held the procedural bars relied upon by the lower courts ("cause and prejudice" test the first time and "deliberate bypass" test the second time) were improper and that his due process claims should be reviewed on the merits.

In the instant petition, the Petitioners (the "State") claim the merits of Mr. Reynolds' due process claims cannot be examined based upon the procedural bar of the "deliberate bypass" test as set forth in *Fay v. Noia*, 372 U.S. 391 (1963). They assert that since neither of the claims was raised at trial or on direct appeal by Mr. Reynolds' trial counsel, Joseph Hurley, or his appellate counsel, Karl Haller, a strategic decision was made by his counsel to deliberately bypass state procedural rules, thus barring federal habeas relief pursuant to *Fay*.

This assertion is flawed in two respects. First, concerns about binding a defendant to

counsel's strategic decisions are not relevant unless there is a state procedural rule that penalizes those decisions by waiving the claims that were not raised. Delaware did not have a procedural default rule requiring Mr. Reynolds to either move for a mistrial and/or request an instruction or risk waiving the assertion of those claims at a later point. *Reynolds v. Ellingsworth*, 3rd Cir., 843 F.2d 713 (1988) (*Reynolds I*), *cert. denied*, 488 U.S. 960 (1988). Logically, the significance of a supposed "strategic" decision only comes into play when a procedural rule is found to exist. The "gap" in federal habeas jurisprudence and "deliberate bypass" test "gapfiller" proposed by the State, Petition (Pet.) 22, are nothing more than legal fictions of the kind expressly denounced by this Court in *Fay v. Noia*, 372 U.S. at 439.

Second, despite the state court's determination to the contrary, it is questionable whether Mr. Reynolds' counsel made a strategic decision to not move for a mistrial and to not ask for an instruction, and whether Mr. Reynolds was consulted in such a decision if so made. At the state evidentiary hearing the court improperly applied the "cause and prejudice" test to the facts of this case; the court never examined the facts to determine whether strategic decisions were made but rather merely examined them to determine if Mr. Reynolds could show cause for his failure to make a timely objection to the improper prosecutorial remarks. As the Third Circuit noted, "Reynolds' counsel at the time of trial had no reason to anticipate that the failure to ask for a mistrial or a jury instruction (or even the failure to raise the confession issue on direct appeal) would bar consideration of Reynold's due process claims in a state post-conviction relief proceeding[.]" App. 16. Subsequent reviews by the district court have thus erroneously presumed the state court's determination to be correct pursuant to 28 U.S.C. § 2254(d).

II. The Deliberate Bypass Doctrine of *Fay v. Noia* Has Been Overruled and Does Not Bar Federal Habeas Relief Where State Relief Was Not Deliberately Bypassed.

Fay v. Noia, 372 U.S. 391 (1963), was a response to the restrictive approach adopted by this Court in *Brown v. Allen*, 344 U.S. 443 (1953), with regards to the issue of procedural default as a bar to habeas review. The *Brown* Court held that an adequate and independent state procedural ground barred federal habeas corpus relief. 344 U.S. at 487.

The *Fay* Court rejected *Brown*'s holding, noting that the jurisdiction of the federal courts on habeas corpus is not affected by procedural defaults incurred by the applicant during the state court proceedings. 372 U.S. at 434. *Fay* further recognized a limited discretion in a federal judge to deny habeas relief under certain circumstances.

The "deliberate bypass" doctrine as set forth in *Fay* states, ""[T]he federal habeas judge may in his discretion deny relief to an applicant who has deliberately bypassed the orderly procedure of the state courts and in doing so has forfeited his state court remedies." 372 U.S. at 438. The doctrine continues, "At all events we wish it clearly understood that the standard here put forth depends on the considered choice of the petitioner. (Citations omitted). A choice made by counsel not participated in by the petitioner does not automatically bar relief." 372 U.S. at 439 (emphasis added). *See also* Robert Goss Szabo, *Federal Habeas Corpus and the Doctrine of Waiver Through the Deliberate Bypass of State Procedures*, 21 LA. L. REV. 601 (1971). The Court made it very clear that this grant of discretion is not to be interpreted as a permission to introduce legal fictions into federal habeas corpus. 372 U.S. at 439.

The "deliberate bypass" doctrine finds its justification in comity concerns. App. 19. As a waiver doctrine its controlling standard is provided by the classic definition of waiver -- "an

intentional relinquishment or abandonment of a known right or privilege." 372 U.S. at 439. The "deliberate bypass" doctrine applies only when the habeas applicant understandingly and knowingly forgoes the privilege of presenting his federal claims in state court. App. 19.

In 1977, *Fay* was limited to its rather peculiar facts by *Wainwright v. Sykes*, 433 U.S. 72, 87-89 (1977). The *Sykes* Court rejected as dictum the suggestion in *Fay* that the "deliberate bypass" test was an all-inclusive waiver standard applicable whenever a state prisoner committed a procedural default. 433 U.S. at 87-88. In 1991, *Fay* was overruled by *Coleman v. Thompson*, 111 S.Ct. 2546, 2564-66 (1991), wherein the Court noted that the "deliberate bypass" standard was superseded by subsequent decisions applying the "cause and prejudice" standard set forth in *Sykes*. Subsequently, the Court of Appeals for the Third Circuit definitively held that *Fay v. Noia* does not bar a defendant from raising federal due process claims in federal court if his attorney made a tactical decision to not raise those claims at trial or on direct appeal and no applicable state procedural bar existed otherwise. App. 2.

The State acknowledges in its Petition that this Court has put to rest the deliberate bypass doctrine,[3] Pet. 17 and 22. Despite this acknowledgement that *Fay* has been overruled however, the State would have this Court resurrect the "deliberate bypass" doctrine in order to create a procedural bar and prevent Mr. Reynolds' due process claims from being heard on their merits, as the Court of Appeals for the Third Circuit has twice instructed the district court to do. The State proffers this doctrine should be resurrected to fill an alleged gap in the area of federal habeas jurisprudence. The State argues that between a finding that a state procedural bar is inadequate under *Sykes* and a strategic decision not to raise an issue at trial lies a gap in federal

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[3] *Keeney v. Tamayo-Reyes*, 112 S.Ct. 1715, 1719-21 (1992); *Coleman*, 111 S.Ct. at 2565.

habeas jurisprudence which should be filled by the obsolete "deliberate bypass" test. Pet. 22. This "gap" contrived by the State is nothing more than a legal fiction of the kind *Fay v. Noia* expressly admonished against creating. 372 U.S. at 439.

Concerns about binding a defendant to counsel's strategic decisions are not relevant in the absence of a state procedural rule penalizing such decisions with waiver of federal due process claims. The purpose of binding a defendant to such strategic decisions was borne from a concern of preventing defense counsel from flouting state procedures. *Wainwright v. Sykes*, 433 U.S. at 90; *Fay v. Noia*, 372 U.S. at 428-39; *Henry v. Mississippi*, 179 U.S. 433, 451 (1965). The absence of such a procedure obviates the concern for binding a defendant to the strategic decision. This explains why no inquiry was made in *Sykes* into counsel's motivations for not raising a claim when scrutinizing the "adequacy" of Florida's procedural rule. Instead, *Sykes* left this consideration to the "cause" aspect of its newly enunciated "cause and prejudice" test. *Sykes*, 433 U.S. at 91 and n. 14. Where no procedural rule is deemed independent and adequate to bar federal review the inquiry ends without any need or requirement to determine the motivation behind failing to raise a claim.

Assuming *arguendo* that if such a gap existed and *Fay*'s "deliberate bypass" test was employed to determine whether strategic decisions were made, then the test would have to be applied in its entirety. This would include determining whether the habeas applicant was consulted regarding counsel's decisions. Most courts will not find such a strategic waiver where there is substantial evidence that the habeas petitioner did not acquiesce in his defense counsel's trial strategy. *See United States ex rel. Bolognese v. Brierly*, 412 F.2d 193 (3rd Cir. 1969). Furthermore, under *Fay v. Noia* a fictional waiver of rights cannot bar habeas corpus relief.

The State's repeated attempts to place this case within the confines of a "deliberate bypass" label is just such a fictional waiver.

The "deliberate bypass" doctrine is inapplicable to the facts of Mr. Reynolds' case, App. 20, and to apply it and bar a review on the merits of Mr. Reynolds' due process claims would be a miscarriage of justice. Unlike the habeas petitioner in *Brownstein v. Director of Illinois Dep't of Corrections*, 760 F.2d 836 (7th Cir. 1985), *cert. denied*, 474 U.S. 858 (1985), Mr. Reynolds did not understandingly and knowingly forego the privilege of seeking to vindicate his federal claims in the Delaware courts nor have his counsel ever been found to have made a decision to deliberately forfeit his chance at state review of his federal claims. App. 20. "Accordingly, he cannot be said to have deprived the Delaware courts of the opportunity to pass on his constitutional contention." App. 20. *See Lefkowitz v. Newsome*, 420 U.S. 283 (1975).

The difference between the instant case and *Brownstein* is that Brownstein admitted that he understandingly and knowingly forewent his sixth and fourteenth amendment right to a jury trial. 760 F.2d at 838. Brownstein was fully aware of his right to a jury trial but decided, with the assistance of counsel, to make a knowing and voluntary waiver of that right. *Id.*

The record reflects no such knowledge or understanding in the instant case, as will be further discussed below. Mr. Reynolds' counsel may have overlooked requesting a mistrial or made a strategic decision to not request one; the record is unclear and the state court never properly reviewed the facts in the proper context. App. 15. Moreover, if such a decision was made (which is questionable), the record reflects no participation by Mr. Reynolds in that decision.

III. The Factual Determination That Defense Counsel Made a Strategic Decision To Not Present Mr. Reynolds' Due Process Claims Has Improperly Acted As a Procedural Bar To a Review of Those Claims.

In response to Mr. Reynold's first petition for post-conviction relief at the state level, a one hour[4] evidentiary hearing was held on November 12, 1982 at which time Messrs. Hurley and Haller were questioned regarding their actions at trial and on appeal of Mr. Reynolds' case. Due to Hurley's lack of recollection, a subsequent two hour hearing was held on February 28, 1983 to allow him time to review the trial transcript in an effort refresh his memory.

The issue presented at the hearings was whether the prosecutor's improper prosecutorial remarks warranted post-conviction relief where Mr. Reynolds' counsel did not seek a mistrial during the course of the trial. App. 85. The attorneys' testimony reflects that Hurley was lead counsel at trial; he handled all the aspects of the trial and his judgment prevailed on all decisions associated therewith. App. R-1, R-2 and R-10. Haller was present for most of the trial but did not actively participate. App. R-10. Haller solely handled the direct appeal without any involvement from Hurley. App. R-9 and R-10. Therefore, in the context of the issue presented by the Rule 35 motion for postconviction relief, the actions of Hurley must be given considerable more weight than those of Haller.[5]

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[4] The abbreviated length of this first hearing was the result of Mr. Hurley's total and complete lack of independent recollection of the facts of the case, which was only refreshed, though not sufficiently, after reviewing the trial transcript. App. R-8.

[5] Haller testified he had no present recollection regarding a motion for mistrial but that he would have been opposed to such a motion because in his opinion mistrials merely provide the State the opportunity to correct mistakes made during the first trial. App. R-6 and R-7.

He further attempted to justify his opinion by explaining that he hoped the Reynolds' jury would not rely as evidence upon the improper prosecutorial remarks in the opening statement despite that fact that no instruction was given to the jury that opening and closing statements are

Hurley's testimony is fraught with answers which could easily lead to the conclusion that it was mistake or inadvertence rather than a strategic decision that resulted in a mistrial not being requested. When asked what he normally would have done in the face of improper prosecutorial remarks such as those that occurred at Mr. Reynolds' trial, Hurley responded:

> A. Ordinarily, depending upon the impact of the [improper] statements made by the prosecutor in his opening, I would consider making a mistrial. I would consider asking for an instruction to the jury in the alternative[.]
>
> Q. . . . Do you feel that [the prosecutor's improper] statements, in your opinion, would have had an impact upon the jury with respect to Mr. Reynolds?
>
> A. Unquestionably.

App. R-3.

* * *

> A. As I look at this today and as I still sit here, I cannot imagine why I didn't make a motion for mistrial.

App. R-3 and R-4.

* * *

> A. For me to have to justify to you why I wouldn't have moved for a mistrial, there is no reason in the world. It should have been moved for. The only thing I can say is there could have been -- and I find it difficult to believe under the circumstances. There could have been a trial tactic in summation, . . . I don't know that I did that. Probably I didn't do it. So there could be other explanations why I didn't move for a mistrial, although I find it

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not to be considered evidence in the case. App. R-12.

Haller also testified he did not raise the improper prosecutorial remarks on appeal because he felt other arguments were stronger. App. R-11.

very hard to believe that outside the presence of a jury, I wouldn't, at least, make a motion to protect the record. I just cannot fathom it.

App. R-5.

* * *

Q. Are you saying it is basically an oversight?

A. I would say, . . ., that is the only explanation I can give. It was blown.

App. R-13.

At the subsequent hearing, Hurley again noted that his independent recollection of Mr. Reynolds' case was still faulty and that at best he could only hypothesize as to why he might have not moved for a mistrial. His first hypothesis was that he did not want a mistrial because it would give the prosecution a second opportunity to proffer Mr. Reynolds' alleged confessions after marshalling stronger evidence to support their admissibility. App. 5. The second hypothesis was that a motion for a mistrial might have prompted the prosecutor to ask for a recess and rethink his decision to withdraw the confessions. App. 5. His third hypothesis was that he simply overlooked the issue -- in his words, " I didn't catch it," or "I blew it." App. 5. When asked which hypothesis he placed the most reliance upon, Hurley answered, "Intellectually, the first. Emotionally, the third." App. 5.

Relying upon this testimony, the state court improperly applied the "cause and prejudice" test of *Conyers v. State*, Del. Supr., 422 A.2d 345 (1980) (utilizing the test as set forth in *Wainwright v. Sykes*, 433 U.S. 72 (1977)), to determine whether Mr. Reynolds had shown cause for his failure to make a timely objection. The application of the "cause and prejudice" test is a matter of law. Mr. Reynolds' Rule 35 motion for postconviction relief was denied without

reaching the merits of his due process claims because the court found Mr. Reynolds had not shown "cause" for his failure to raise his due process claims at trial or on direct appeal. App. 89. The court held the situation fell squarely within the language of *Engle v. Isaac*, 456 U.S. 107 (1982), that counsel might have overlooked or chosen to omit Mr. Reynolds' due process argument while pursuing other avenues of defense. App. 89.

Using the same misguided reasoning and misapplication of the "cause and prejudice" test, the state supreme court, App. 91-92, and the district court, App. 76, affirmed the lower state court's decision. Only upon review by the Court of Appeals for the Third Circuit was the erroneous application of the "cause and prejudice" test uncovered and the case remanded to the district court for review on its merits. *Reynolds I*, 843 F.2d at 718-722.

On remand, in an effort to procedurally bar Mr. Reynolds' due process claims so as to avoid having to review them on their merits, the issue found crucial by the district court was whether deliberate strategic decisions were made in order to apply the "deliberate bypass" test of *Fay v. Noia*. In denying relief based upon the application of the "deliberate bypass" test, the district court again abided by the state court's determination that Mr. Reynold's counsel made a strategic decision not to move for a mistrial despite the language of the state court's holding that Mr. Reynolds' counsel either overlooked making the motion or made a strategic decision not to so move.

On appeal the second time the Third Circuit noted its task was not to determine whether strategic decisions were made. App. 15-16. It assumed *arguendo* that strategic decisions were made because the district court's refusal to reach the merits of Mr. Reynolds' claims was inappropriate even if strategic decisions were made. App. 16. The Third Circuit further held

that even assuming *arguendo* that *Fay* retained independent viability in spite of *Sykes* and *Coleman* (which it has not), Mr. Reynolds' petition for habeas corpus relief would still merit review.

a. The district court was not required to presume strategic decisions were made.

In applying the "deliberate bypass" test, the district court relied upon the state court's findings pursuant to 28 U.S.C. § 2254(d). Section 2254(d) requires habeas courts to accord a presumption of correctness to the written findings of fact made at state trial and appellate court proceedings in which the petitioner was a party. However, the presumption of correctness applies only to factual issues, and courts have been careful to distinguish factual questions from questions of law. *See Miller v. Fenton*, 106 S.Ct. 445 (1985) (the voluntariness of a confession is not an issue of fact presumed to be correct under section 2254(d) but is a legal question meriting independent federal consideration).

The hearing conducted by the superior court, and relied on by the district court, was for the purpose of applying the "cause and prejudice" test of *Wainwright v. Sykes* to Mr. Reynolds' counsel's failure to object to the prosecutor's opening statement. Clearly the application of the "cause and prejudice" test is a matter of law.

The district court interpreted *Fay* to require that Mr. Reynolds' federal due process claims be barred from federal habeas review if, for strategic reasons, Mr. Reynolds' counsel deliberately bypassed the opportunity to object. The district court held it was required pursuant to § 2254(d) to presume strategic decisions were made, a holding which troubled the Third Circuit given counsel's other hypotheses of mere oversight or inadvertence as justification for

why no objection was made to the prosecutor's improper remarks during his opening statement. App. 15.

The issue of whether Mr. Reynolds' trial counsel deliberately bypassed the opportunity to object to the prosecutor's remarks was not resolved in the state court hearing. The principal purpose of that hearing was to apply the *Sykes* "cause and prejudice" test. The majority of the superior court opinion concerns a discussion of the contemporaneous objection rule (App. 85-88); the court's decision on that matter was eventually overruled by the Third Circuit in *Reynolds I*. Nowhere in the superior court opinion is the term "deliberately bypassed" used. The opinion's limited discussion of the rationale behind the failure of Mr. Reynolds' trial counsel to object is only included in the opinion as a corollary matter. App. 87-88.

A conclusion that the failure of Mr. Reynolds' trial counsel to object to the prosecutor's remarks constituted a deliberate bypass is not fairly supported by the record. The merits of the factual dispute at issue were not resolved in the state court proceeding and the district court's reliance on § 2544(d)'s presumption of correctness is erroneous and should not be allowed to aid in the application of the improper and obsolete procedural bar known as the "deliberate bypass" test.

b. The district court improperly used the "deliberate bypass" test as an excuse to avoid reviewing the due process claims on their merits.

In its 1992 opinion, App. 49, the district court noted that it believed a strong case could be made for Mr. Reynolds' contention that his trial was not fundamentally fair, but chose to deny his writ based upon a procedural bar masked as "deliberate bypass." The court noted that in his opening statement at Mr. Reynolds' trial the prosecutor focused almost entirely on two

statements Mr. Reynolds made to the police which were never subsequently entered into evidence. App. 48. The district court also noted that "the trial concluded with the jury having heard very little evidence -- all of it circumstantial and highly controverted -- connecting Reynolds to the murder." App. 48.

The only evidence supporting Mr. Reynolds' conviction came from Miles Cuffee, a former suspect himself. The district court noted that Cuffee's testimony was "hopelessly confused and contradictory, and was riddled with falsehoods." App. 54. The court further stated, "When looking at all these factors and the meager and contradictory evidence supporting the conviction, we are very troubled by this case." App. 61.

In spite of all these reservations and doubts, the district court hid behind the shield of the "deliberate bypass" test and refused to review the merits of Mr. Reynolds' due process claims. In its Petition, the State suggests that it would just be easier for all involved if Mr. Reynolds' due process claims were procedurally barred from review on their merits. The State implies that it would be a burden for the State to retry the Respondent in a "case involving a murder committed 20 years ago." Pet. 25. Query whether the fear of having to possibly retry this case is driving the court's refusal to address the merits of Mr. Reynolds' due process claims. The age of a conviction should have no bearing whatsoever on this Court's or any other court's decision. In affirming a grant of relief from a 24-year old conviction, this Court said in *Vasquez v. Hillery*, 106 S.Ct. 617, 624 (1986), "There is not . . . a fixed statute of limitations for filing federal habeas corpus petitions. *See also Heflin v. United States*, 358 U.S. 415, 420 (1959) (in habeas corpus there is no statute of limitations).

Furthermore, the State proffers that prisoners have every incentive to delay presentation

of their claims in the hope that reprosecution will become impossible. Pet. 25-26. There is no incentive for Mr. Reynolds to extend his prison term by delaying the presentation of his federal due process claims. The record reflects that if anyone has delayed presentation of Mr. Reynolds' due process claims it is the State itself, fabricating procedural bar after procedural bar for fear of having to address the merits of Mr. Reynolds' claims and conclude that retrial is necessary and warranted.

The "deliberate bypass" test should not be applied to Mr. Reynolds' case. Not only is the test no longer viable, having been superseded by *Sykes* and its progeny, but it is also inapplicable given Delaware's procedural rules at the time of Mr. Reynolds' conviction in 1977. The Court of Appeals for the Third Circuit has held on two different appeals in the last six years that the district court must review the merits of Mr. Reynolds' due process claims. Only that review will allow justice to be served in this case.

CONCLUSION

For the above reasons, the petition for writ of certiorari should be denied. The decision of the court of appeals, reversing and remanding the matter to the district court for consideration of the merits of Mr. Reynolds' habeas petition, should stand with a direction from this Honorable Court that the district court's order for briefing and oral argument be followed.

Respectfully submitted,

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days later we started the trial.

Q. In June of 1977, when Mr. Sullivan contacted you, were you a member of the Public Defender's Office?

A. I was not.

Q. You were a private attorney with a private practice?

A. That's correct.

Q. The attorney who represented Mr. Reynolds before your involvement was Mr. Haller; is that correct?

A. To my knowledge.

Q. Do you know whether or not Mr. Haller is, in fact, a regularly-employed member of the Public Defender's Office?

A. I assumed that he was at that time. I don't know what he is now.

Q. When you actually came down for the trial, did you have any discussions as to who would be lead counsel and undertake the bulk of the court presentation, including argument and cross-examination, and things of that nature?

A. I don't recall the exact discussion. I have to make an assumption. The first assumption is that I am something of a prima donna, and I would insist that I be lead counsel under the circumstances.

I don't recall whether Karl had agreed to that or whether Karl had asked Larry to have somebody assume that role.

with respect to the various objections that would be raised or motions that would be made as between you and Mr. Haller?

A. I would view it as there being two kinds of decisions. There are decisions that are instantaneously made by an experienced attorney where there is no time to reflect upon it. You do it, I will say, instinctively, where you jump up from a table, where you are standing at a podium, and you do something, and you use your judgment. I would make those, because I was doing the standing up.

There are other kinds of decisions, strategic decisions, as to whether you are going to call witnesses and what you are going to ask them. I would say that Mr. Haller and I would have conferred. If we agreed, then we made it jointly. If we didn't agree, I don't remember. I would assume that I thought I was lead counsel, and if there had been a disagreement, I would assume that my judgment would have been the prevailing judgment, although I don't recall that we didn't agree on anything strategic. I would take the responsibility, though.

Q. Who made the decision to voir dire or to conduct a voir dire examination to determine the admissibility of the March 28th and March 31st alleged confessions of George Reynolds?

A. I can't say that anyone -- I can't imagine either of us not agreeing that that would be the normal -- it is so

THE WITNESS: I want to repeat your question so I make sure I understand. I assume you are telling me that I am to assume that the prosecutor made a statement in his opening referring to a confession or confessions or incriminating remarks made by my client. I then assume in voir dire, outside the presence of the jury, for one reason or another in this particular case the prosecutor withdrew his proffer and the statements were never introduced into evidence. What I would ordinarily do at that point?

BY MR. WOLHAR:

Q Yes.

A Ordinarily, depending upon the impact of the statements made by the prosecutor in his opening, I would consider making a mistrial. I would consider asking for an instruction to the jury in the alternative, depending upon the impact of the opening statement.

Q You have, a few moments ago, read from certain portions of the opening statement of Mr. Burke, as set forth in the Official Court Reporter's transcript of the opening statement. Do you feel that those statements, in your opinion, would have had an impact upon the jury with respect to Mr. Reynolds?

A Unquestionably.

Q. Unquestionably?

A. (Witness nodding in the affirmative.)

Q. Do you feel that that reference by Mr. Burke in his opening statement to the confessions of Mr. Reynolds that were later withdrawn would have justified a motion for mistrial or, at least, a curative instruction?

A. Would you ask me one or the other, please?

Q. Let's go for a motion for mistrial.

A. As I look at this today and as I still sit here, I cannot imagine why I didn't make a motion for mistrial.

Q. Can you explain why you did not make a motion for a curative instruction, assuming that a curative instruction would legally have been sufficient to remove that taint from the jury's mind?

A. Again, I have to refer to the fact that I have no independent recollection. I only can try to speculate on why I would act or not act the way that I did in a particular circumstance. As clear as it is to me that I would make a motion for mistrial, it is that clear that I would not ask the jury to be instructed, because I think it would call attention to what I would regard as very damaging remarks in the opening statement. I think I would have asked for a mistrial and let it lay there. If the judge said no to that, I wouldn't want

prosecutor and the results of a voir dire that I don't even know happened, but I assume that you are correct. For me to have to justify to you why I wouldn't have moved for a mistrial, there is no reason in this world. It should have been moved for.

The only thing I can say is there could have been -- and I find it difficult to believe under the circumstances. There could have been a trial tactic in the summation, in that I wanted to be able to demonstrate that the State was the one who made a lot of promises, but could deliver very little, and one of the examples would be, "I would offer that they told you about statements. Where are the statements?"

I don't know that I did that. Probably I didn't do that. So there could be other explanations why I didn't move for a mistrial, although I find it very hard to believe that, outside the presence of a jury, I wouldn't, at least, make a motion to protect the record. I just cannot fathom it.

When you handed me this, it shook me, and I am still shaken by it. No matter what you do in front of a jury, I cannot see how anybody could have, with this information at hand, knowing the prosecutor had made a statement as damaging as I view Mr. Burke's opening statement and knowing he has withdrawn a proffer, not at that moment said, instantaneously, "In light

Q At the time that Mr. Burke affirmatively withdrew --

MR. MYERS: Mr. Wolhar said it four times now -- I think he is drawing his conclusion -- about affirmatively withdrawing. I think the record speaks for itself.

MR. WOLHAR: Your Honor, it says, "I am in the position" --

THE COURT: I will not be influenced one way or the other by the phraseology.

MR. WOLHAR: All right. I am just using Mr. Burke's wording from the transcript that he could not affirmatively argue with respect to those statements, and he did state on the record he was withdrawing them.

BY MR. WOLHAR:

Q At the time that Mr. Burke withdrew the March 28th and March 31st alleged confessions of Mr. Reynolds, was a motion for mistrial made, to your recollection, by the defense?

A I have no present recollection. I could say that if I had anything to do with the motion for mistrial, I would have been opposed to it.

Q You would have been opposed to it?

A I certainly would have been opposed to it.

Q Notwithstanding the fact that Mr. Burke made extensive statements in his opening statement?

that conclusion, and I have come to the point now where the only reason I will ask for a mistrial, I believe, is to make a record, because it simply -- if you get a mistrial, it simply gives the State a second chance to get everything corrected that they have messed up the first time.

Q So regardless of the error that may occur during the trial, it is your policy to avoid, at all costs, a motion for mistrial because of the expense and --

A I wouldn't be prepared to say regardless of the error, but I would say that in the last four years, I have not seen an error of such magnitude that would cause me to ask for a mistrial. I have trouble even visualizing that it would be that big of an error.

Q After reviewing the opening statement of Mr. Burke to the jury that referred specifically to the alleged confessions of Mr. Reynolds on March 28th and March 31st, do you think those references reached the magnitude of serious error in a trial when the confessions were later withdrawn from evidence?

A Personally, no.

Q You are saying personally --

A We did the appeal on this. My office did the appeal on this, and I believe I signed the appeal, and it was brought to my attention as regards the supposed error we are talking

Q Mr. Hurley, I assume, in the brief recess, you had an opportunity to review your closing summation?

A I have.

Q Have you read the previous portions of the transcript that were sent to your office in November of 1982?

A I have read it, but not in 1982. In December or January everything that you sent me, the materials that I have been provided with, I have read them all from cover to cover.

Q Is your memory sufficiently refreshed as to the trial that occured in this matter in June of 1977?

A I don't know that it is sufficiently refreshed, but it is refreshed more than it was when I testified in November.

Q You were present in the courtroom during all portions of the trial; is that correct?

A That's correct.

Q I believe you also testified you played the roll of lead counsel in the trial? That is, you made the statements to the jury, you conducted the cross-examination, you addressed the Court on various motions that were presented, and you conducted the voir dire examinations?

A Yes.

Q I will show you the excerpts of Mr. Burke's opening statement of the trial that commenced on June 7, 1977, and I

not remember, and it was a telephone conversation.

Knowing Sam Burke as I thought I did and measuring my adversary, I can look back and say that it is conceivable to me that he may have decided not to withdraw his proffer and pressed for his proffer in order to be able to have the matter mooted by the introduction of the statements.

That is a second hypothesis. The third hypothesis is I didn't catch it.

Q. Which hypothesis do you place the most reliance on, or do you give all three equal reliance?

A. Intellectually, the first. Emotionally, the third.

Q. That decision was made during the course of the trial; is that correct?

A. That is correct.

Q. Once the defendant was convicted, did you attempt to raise the issue about reference to the opening statements by Mr. Burke to the two written confessions on appeal?

A. I was, for want of a better word, a trial specialist. After I left Sussex County and made some remarks about the jury in Sussex County, I went back to New Castle County and put it out of my mind, and had nothing further to do with the case, as was the understanding of my original involvement.

Q. Did you discuss with Mr. Haller, before you left

Q What roll did you take in the actual trial itself?

A Passive.

Q Would you agree with me that Mr. Hurley was lead counsel, made the opening and closing statements to the jury, cross-examined the witnesses, conducted the voir dire, and made whatever motions that were presented to the Court?

A That's correct. My recollection is I wouldn't have appeared on the record at all, I don't believe.

Q As far as the written record of what transpired in the courtroom?

A Right.

Q Who undertook the appeal of the convictions on behalf of Mr. Reynolds?

A I believe I did.

Q You handled that? Did Mr. Hurley take any part in the appeal?

A I don't believe so, but I am not positive. I don't believe he did.

Q At any time after the jury returned the convictions in the Reynolds case, did you and Mr. Hurley discuss possible grounds of error for appeal?

A I have no recollection of doing so. I do not know.

Q This matter was appealed to the Supreme Court and a

decision was rendered December 5, 1980; is that correct?

A A decision was rendered later.

Q You do not recall the date?

A No.

Q Do you recall the issues that were raised on appeal?

A I recall some of the issues. I don't know whether I can recall all of them.

Q Let me ask you this: Was there an issue raised on appeal about the impropriety of Mr. Burke's making references in his opening statement to two written confessions allegedly made by Mr. Reynolds that were later not introduced into evidence?

MR. MYERS: The State would concede that.

THE WITNESS: No, I don't believe so.

BY MR. WOLHAR:

Q You did not raise that?

A No, I don't believe so.

Q Do you know the reason that was not raised on appeal?

A The reason it was not raised on appeal was because, as far as I am concerned, the better grounds for appeal were the interpretation of the stipulation regarding the truth serum and also the very good ground of the newly-discovered evidence when we had the investigating officer saying he believed the wrong man had been convicted.

A. They may have heard the statement, but that was not the evidence that they heard, and they are instructed to base the case on the evidence.

Q. So you do not think the fact that the jury heard these extensive references in Mr. Burke's openings had any impact on the jury, as far as making their final decision in the case?

A. I would hope not. And when we view what could have been done by Mr. Hurley or myself after Mr. Burke withdrew the statement, I don't have any problem saying that we did the right thing in staying away from it. I would have known to stay away from it after being a lawyer for one year, as far as I am concerned.

Q. At that moment, after Mr. Burke withdrew the statements, that was, you thought, a good decision not to address those statements?

A. Right. Just stay away from the statement, because, as I said, they might explode.

Q. You were hoping for an acquittal? You thought you had a good case and that the jury would come back with an acquittal and double jeopardy would preclude a retrial?

A. Even without getting into double jeopardy, et cetera, I do remember there was a weekend wherein I thought about the

of this, we move for a mistrial." I have to assume at this time -- and this is an assumption. I don't remember. I have to assume that, for whatever reason, in the heat of a trial, or whatever, that it did not occur to me that he had made these damaging remarks that he had made, and I was not aware of it.

BY MR. WOLHAR:

Q Are you saying it is basically an oversight?

A I would say, based upon the information available in the limited context I indicated, that is the only explanation I can give. It was blown.

THE COURT: Is there any part of the record that has been transcribed that has not been made available to Mr. Hurley?

MR. WOLHAR: Your Honor, the entire record is a transcript of the trial which consisted of approximately maybe a week or eight days. Then there are various post-trial motions that have resulted --

THE COURT: Let me break it down, first of all. Is there a complete transcript?

MR. WOLHAR: Yes, there is a complete transcript available, Your Honor.

MR. MYERS: Except Mr. Hurley's summation.

MR. WOLHAR: That may be the case. But all the --

THE COURT: I assume a transcript was made of the

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

FILED

GEORGE L. REYNOLDS,

Petitioner,

v.

JACK C. ELLINGSWORTH, Warden, and CHARLES M. OBERLY, III,

Respondents.

Civil Action No. 86-142-RRM

SCHEDULING ORDER

This is a habeas corpus case. On May 2, 1994, the United States Court of Appeals for the Third Circuit remanded this case to this court for consideration of the merits of Reynolds' petition. Reynolds v. Ellingsworth, No. 93-7106 (3d Cir. May 2, 1994) at 21. Pursuant to this mandate, the court adopts the following schedule.

IT IS HEREBY ORDERED as follows:

1) The petitioner may file a brief addressing the merits of his petition no later than thirty days from the date of this Order.

2) The respondents may file an answering brief no later than fifteen days after service and filing of the petitioner's brief.

3) The petitioner may file a reply brief no later than ten days after service and filing of the answering brief.

4) The court will hold oral argument on this matter on October 25, 1994 at 10 a.m.

5) The respondents are responsible for transporting the petitioner to this hearing.

UNITED STATES DISTRICT JUDGE

August 4, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

AUG 30 8 27 AM '94

GEORGE L. REYNOLDS,	)	
	)	
Petitioner,	)	
	)	
v.	)	Civil Action No. 86-142-RRM
	)	
JACK C. ELLINGSWORTH, Warden, and CHARLES M. OBERLY, III,	)	
	)	
Respondents.	)	

ORDER STAYING BRIEFING AND ARGUMENT

Pursuant to the August 29, 1994, letter from counsel, the briefing and argument schedule in the Court's August 4, 1994, Order is stayed and will be re-set on application from counsel for either party.

UNITED STATES DISTRICT JUDGE

Dated: August 29, 1994

No. 94-438

JOHN C. ELLINGSWORTH, ET AL., *Petitioners*,

v.

GEORGE L. REYNOLDS, *Respondent.*

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SUPREME COURT, U.S.

AFFIDAVIT OF SERVICE

I, Elia D. Trowbridge, Esquire, being duly sworn upon my oath state that I did, on the 22nd day of November, 1994, send out, postage prepaid, from Wilmington, DE, one (1) package containing:

one (1) original and twelve (12) copies of the Brief in Opposition to Petition for Writ of Certiorari in the above-entitled case for filing with the Court,

one (1) original and one (1) copy of the Motion for Leave to Proceed *In Forma Pauperis*,

two (2) additional copies each of the Brief in Opposition to Petition for Writ of Certiorari and the Motion for Leave to Proceed *In Forma Pauperis* in the above-entitled case to be time-stamped upon receipt and returned in the enclosed, self-addressed stamped envelope.

All parties required to be served have been served. Proper postage was affixed to said envelope and it was plainly addressed to the following:

William K. Suter
Clerk of the Court
Supreme Court of the United States
Office of the Clerk
Washington, DC 20543
(202) 479-3011

Elia D. Trowbridge
Affiant

SUBSCRIBED AND SWORN TO before me this 22nd day of November, 1994.

Sharon C. Gue
Notary Public
SHARON C. GUE
NOTARY PUBLIC-DELAWARE
My commission expires Nov. 2, 1995

To be filed for:

Beverly L. Bove
Tomar, Simonoff, Adourian & O'Brien
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No. 94-438

JOHN C. ELLINGSWORTH, ET AL., *Petitioners,*

v.

GEORGE L. REYNOLDS, *Respondent.*

AFFIDAVIT OF SERVICE

I, Elia D. Trowbridge, Esquire, being duly sworn upon my oath state that I did, on the 22nd day of November, 1994, cause to be hand delivered one (1) package containing three (3) copies of the Brief in Opposition to Petition for Writ of Certiorari in the above-entitled case and one (1) copy of the Motion for Leave to Proceed *In Forma Pauperis*. All parties required to be served have been served. Said package was hand delivered to the following:

Loren C. Meyers, Esquire
Deputy Attorney General
Delaware Department of Justice
820 North French Street
Wilmington, DE 19801
(302) 571-2500

For Petitioners

Elia D. Trowbridge
Affiant

SUBSCRIBED AND SWORN TO before me this 22nd day of November, 1994.

Sharon C. Gue
Notary Public
SHARON C. GUE
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